84-755 (1)

No.

In the Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA, PETITIONER

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether respondent, who was reasonably suspected of attempting to smuggle contraband drugs carried within her body and who refused to submit to an X-ray, could lawfully be detained at the border by Customs officers for the period of time necessary to examine her bowel movements.

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-12a) is reported at 731 F.2d 1369. The district court's oral ruling denying respondent's suppression motion (App., *infra*, 13a-14a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 24, 1984. A petition for rehearing was denied on August 10, 1984 (App., *infra*, 15a). Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 8, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial on stipulated facts in the United States District Court for the Central District of California, petitioner was convicted of possession of cocaine with intent to distribute it, in violation of 21 U.S.C. 841(a)(1), and unlawful importation of cocaine, in violation of 21 U.S.C. 952(a) and 960(a)(1). She was sentenced to concurrent terms of two years' imprisonment, to be followed by a three-year special parole term. A divided panel of the court of appeals reversed respondent's convictions (App., *infra*, 1a-12a).

1. The evidence, which is summarized in the opinion of the court of appeals (App., *infra*, 2a-4a), showed that shortly after midnight on March 5, 1983, respondent arrived at the Los Angeles airport on a flight from Bogota, Colombia. After passing through an immigration checkpoint she proceeded to a Customs inspection area where, following a review of her travel documents, she was directed to a secondary inspection area for a more thorough examination. There, Customs Inspector Jose Serrato reviewed respondent's passport, inspected her luggage, and questioned her about her trip to the United States. Based on the information gleaned from this examination, Serrato suspected that respondent was carrying drugs internally because she exhibited characteristics common to persons who smuggle drugs concealed in their alimentary canals. App., *infra*, 2a & n.2.

Serrato's suspicion rested on the following facts: respondent came from a source country for narcotics, had previously made numerous trips of short duration to the United States, had paid cash for her ticket, carried little extra clothing or toiletries, had no confirmed hotel reservations, had no family or friends in the United States, and spoke no English. In addition, although respondent claimed that she had come to the United States to purchase clothing and other merchandise for her husband's business in Colombia, she acknowledged

that she had made no appointments to visit potential sellers but intended to take a taxi to various retail stores and to buy the merchandise on the spot (E.R. 93-94, 123-124).[1]

Inspector Serrato arranged for a female Customs officer to conduct a patdown search of respondent. The search failed to produce any evidence of contraband. The Customs officers then asked respondent whether she would consent to an X-ray of her abdominal cavity. Although she initially stated that she would consent, she withdrew her consent when informed that she would be handcuffed while en route to the hospital for the X-ray. App., *infra*, 3a.

The officers on duty at the airport then requested Customs Special Agent Kyle E. Windes to seek a court order for a body cavity X-ray. Windes declined to do so at that time and instead directed that respondent be afforded the options of consenting to an X-ray, remaining in custody until she had a bowel movement, or returning to Colombia on the next available flight. App., *infra*, 3a; E.R. 77, 86, 124; Tr. 29-30. Given these choices, respondent agreed to return to Colombia. The officers advised her, however, that she would be kept under observation until her departure and that, if she excreted any narcotics during that period, she would be arrested (E.R. 86, 125).

While respondent waited to be placed on a return flight to Colombia, she was detained in a room at the airport.[2] Customs officers instructed respondent that if

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[1] "E.R." refers to the excerpt of record in the court of appeals.

[2] As it happened, the next direct flight to Colombia was many hours away (E.R. 86; Tr. 24-25). During the course of respondent's subsequent detention, however, Customs officers attempted to arrange for her departure for Mexico City, where it was believed she could catch a connecting flight to Colombia. These arrangements were thwarted by poor weather conditions, and by the discovery that respondent did not have a visa for

she had to eliminate body wastes, she would be escorted to a nearby restroom, where she would have to use an empty wastebasket; the reason for this procedure was to prevent respondent from flushing contraband down the toilet. Under the continuous observation of Customs officers, respondent remained in the room throughout the night and most the next day, refusing to eat, drink, or empty her bowels; for most of this period, respondent sat curled up in a chair, leaning to one side or another. App., *infra*, 3a-4a; E.R. 89, 93, 100, 125; Tr. 24, 26, 36.

At approximately 3:00 p.m. on March 5, female officers subjected respondent to a second strip search, which again failed to reveal evidence of contraband (App., *infra*, 3a; E.R. 95). An hour later, Agent Windes arrived at the airport and, after consulting with the Customs officers on the scene and with an Assistant United States Attorney, decided to seek a court order authorizing an X-ray and an internal body cavity search. Agent Windes's affidavit in support of the court order summarized the Customs officers' observations with respect to respondent, including her refusal of food, drink, or use of toilet facilities over a 16-hour period.[3] At about midnight, a federal magistrate issued the requested order. App., *infra*, 3a-4a; E.R. 78-79, 80-83.[4]

Mexico and thus could not wait there until the next connecting flight to Colombia. E.R. 95-96, 99.

[3] The affidavit also noted that respondent's "relative lack of toilet articles, her light luggage, and her money being in $50 bills indicate a 'stripped down' or 'clean' approach typical of professional couriers" (E.R. 81).

[4] Because respondent claimed that she was pregnant, the court order provided that "[t]he X-ray and body cavity search is to be conducted only after a medical doctor has approved the use of the X-ray and body cavity search as appropriate for the [respondent] and only after the doctor has considered the [respondent's] claim that she is pregnant" (E.R. 83).

At 12:30 a.m. on March 6, 1983, respondent was taken to the University of Southern California Medical Center, where a rectal examination revealed a balloon containing cocaine.[5] Respondent was then placed under arrest and taken to a room in the prison ward of the hospital. Over the next four days, she excreted 88 balloons containing 528.4 grams of cocaine. App., *infra*, 4a; E.R. 126.

2. Prior to trial, respondent moved to suppress the cocaine (E.R. 15-27). She argued, inter alia, that the affidavit supporting the court order for the body cavity search was tainted by information obtained during an unlawful detention (E.R. 20-23).

The district court denied the motion (App., *infra*, 13a-14a). The court noted that, because the court order was based on information gleaned during the course of respondent's detention, the validity of the court order turned on the validity of the detention. In this regard, the court pointed out that, after they initially questioned respondent, the Customs officers had "a very substantial suspicion" that she was smuggling narcotics concealed inside her body (*id.* at 14a). On this basis, the court concluded that the officers were justified in seeking respondent's consent to an X-ray examination and, upon her refusal to consent, in detaining her until she either could be placed aboard a return flight to Colombia or had a bowel movement that would confirm or negate the officers' suspicions *(ibid.)*.

3. A divided panel of the court of appeals reversed (App., *infra*, 1a-12a). The court did not question the sufficiency of the information supporting the court order authorizing a body cavity search of respondent. It held, however, that the information underlying the court order, which included observation of respondent's suspicious behavior while detained, was the fruit of an unlawful detention of respondent, and that the cocaine

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[5] A previously administered test disclosed that respondent was not pregnant (E.R. 90, 126).

therefore should have been suppressed. The majority acknowledged that the Customs officers "had limited options in the face of their strong belief that [respondent] was a drug courier. They could let her into the country and try to follow her; they could seek a court order for an X-ray without undue delay; or they could detain her until nature took its course" (*id.* at 6a). In concluding that the officers' choice of the latter option was unreasonable, the majority noted that, under its recent decision in *United States* v. *Quintero-Castro*, 705 F.2d 1099 (1983), at the time the officers decided to detain respondent they lacked the necessary level of suspicion—a "clear indication" that she was engaged in alimentary canal smuggling—to obtain a court order for an X-ray search (App., *infra*, 6a). In these circumstances, the majority reasoned that the facts known to the officers likewise did not justify the lengthy period of detention, which the officers knew would result in "many hours of humiliating discomfort," for the purpose of examining respondent's bowel movements (*ibid.*).

Judge Jameson dissented (App., *infra*, 8a-12a). He noted at the outset that respondent did not, in fact, move her bowels under the observation of Customs officers, and that even though respondent "may have suffered 'many hours of humiliating discomfort,' she was herself solely responsible for a considerable part of it" (*id.* at 9a). In addition, Judge Jameson concluded that he "would permit reasonable detentions at the border for the purpose of observing persons suspected of alimentary canal smuggling so long as the detention is based on real suspicion sufficient to justify a strip search" (*id.* at 11a).[6] He reasoned that performance of

[6] In *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970), the court of appeals defined "real suspicion" sufficient to justify a strip search at the border as "subjective suspicion supported by objective, articulable facts that would reasonably lead an experienced, prudent customs official to suspect that a particular person seeking to cross our border is concealing something on his body for the purpose of transporting it into the United States contrary to law."

peristaltic functions under observation of a Customs official is not significantly more intrusive than a strip search, as it involves merely passive visual inspection of bodily waste products, and that it is less intrusive than either a body cavity or an X-ray search, as to which the court had imposed the more rigorous "clear indication" standard. Addressing the reasonableness of detaining persons reasonably suspected of smuggling narcotics in their bodies, Judge Jameson observed that "indications of alimentary canal smuggling can only be observed *over a period of time*. Allowing a reasonable period of detention, based on a real suspicion, is the least intrusive and most reliable means of identifying alimentary canal smugglers" (*id.* at 10a-11a; emphasis in original; footnote omitted).[7] Finally, he noted that "[t]o deny the validity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our border" (*id.* at 12a).

REASONS FOR GRANTING THE PETITION

Cases involving searches or seizures of persons stopped at the border who are suspected by Customs officers of attempting to smuggle narcotics ingested into their bodies[8] raise a number of important and

[7] Judge Jameson noted that, "[a]s a practical matter * * * a detention would not be necessary if customs officials could seek a court order for an X-ray on the basis of 'real suspicion'" (App., *infra*, 11a n.3). He noted, however, that the court of appeals had "adopted the higher 'clear indication' standard for X-ray searches" and that, although "the wisdom of this decision may be questioned, * * * it is the law of the circuit" (*ibid.*).

[8] As explained in *United States* v. *Couch*, 688 F.2d 599, 605 (9th Cir. 1982), alimentary canal smuggling involves the taking of a laxative to clean out the smuggler's digestive system, swallowing narcotics placed inside capsules or balloons, and finally taking drugs to inhibit digestion during the trip. Once the smug-

recurring questions of Fourth Amendment law. One of these questions—presented here—concerns the permissibility of detaining a suspect who refuses to submit to an X-ray search for the period of time necessary to examine his bowel movements for evidence of contraband. The decision of the court of appeals in this case, holding that such detentions at the border are unlawful unless supported by a "clear indication" that the suspect is carrying drugs internally, is in direct conflict with the decision of the Eleventh Circuit in *United States* v. *Mosquera-Ramirez*, 729 F.2d 1352 (1984). We believe that review by this Court is warranted to resolve this conflict and provide a single, nationwide standard for determining the reasonableness of detentions at the border of persons suspected of attempting to smuggle narcotics concealed inside their bodies.

1. In *United States* v. *Quintero-Castro*, 705 F.2d 1099 (9th Cir. 1983), the court of appeals held that an X-ray search at the border for the purpose of detecting body cavity smuggling is comparable in intrusiveness to a body cavity search, and that a "clear indication or plain suggestion"[9] that the suspect is carrying contra-

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gler reaches his destination, he takes another laxative to retrieve the contraband.

[9] The Ninth Circuit first articulated the "clear indication or plain suggestion" standard in upholding a body cavity search at the border in *Rivas* v. *United States*, 368 F.2d 703, 710 (1966), cert. denied, 386 U.S. 945 (1967). The court subsequently has explained that a "'[c]lear indication' means more than real suspicion but less than probable cause." *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1302 (9th Cir. 1983). But see 3 W. LaFave, *Search and Seizure* §10.5, at 286-287 (1978).

The "clear indication" standard has its origins in *Schmerber* v. *California*, 384 U.S. 757 (1966). In *Schmerber*, where the defendant had been lawfully arrested for driving while intoxicated, the Court rejected the notion that extraction of a blood sample from the defendant's body could be upheld as a search

band in his body cavity is necessary in order to justify such procedures under the Fourth Amendment. See also *United States* v. *Couch*, 688 F.2d 597, 604-605 (9th Cir. 1982); *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982); *United States* v. *Aman*, 624 F.2d 911, 912-913 (9th Cir. 1980). In the instant case, the court of appeals held (App., *infra*, 6a) that if the information known to the Customs officers is insufficient to justify an X-ray search of a suspected smuggler under the "clear indication" standard adopted in *Quintero-Castro*, it likewise is insufficient to justify the suspect's detention for the period of time necessary to examine his bowel movements for evidence of contraband.

On the other hand, the Fifth and Eleventh Circuits have both held that an X-ray search at the border of a suspect's abdominal cavity is permissible if supported by a reasonable suspicion that the suspect is engaged in smuggling activity. *United States* v. *Mejia*, 720 F.2d

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incident to arrest, without any further justification. The Court explained (384 U.S. at 769-770):

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any * * * intrusions [beyond the body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.

Because the facts establishing probable cause to arrest also suggested the relevance and likely success of a test of the defendant's blood for alcohol, the Court held that the "clear indication" test had been met. *Id.* at 770.

We think it may fairly be assumed that *Schmerber* employed the "clear indication" standard as a synonym for probable cause. Of course, we do not dispute that, outside of the border context, a detention of the sort involved in this case would likewise require probable cause.

1378, 1382 (5th Cir. 1983); *United States* v. *Vega-Barvo*, 729 F.2d 1341 (11th Cir. 1984), petition for cert. pending, No. 84-5553.[10] The court in *Vega-Barvo* (729 F.2d at 1350) expressly acknowledged that its holding was directly contrary to that of the Ninth Circuit in *Quintero-Castro*, but, in view of the fact that body cavity X-rays performed by hospital personnel do not involve physical contact, exposure of intimate body parts, or use of force, and in the absence of a generalized showing that routine abdominal X-rays pose a significant health risk, the court concluded that "it would be inappropriate to impose stringent Fourth Amendment constraints on their use in border searches" (729 F.2d at 1348).

Furthermore, in *United States* v. *Mosquera-Ramirez*, 729 F.2d at 1357, the Eleventh Circuit held that "[t]he detention of persons at the border long enough to reveal by natural processes that which would be disclosed by a more expeditious X-ray search cannot be held to be an unreasonable seizure. Nor can the search of the results of that natural process be held to be an unreasonable search." Accord, *United States* v. *De Montoya*, 729 F.2d 1369, 1371 (11th Cir. 1984). In *Mosquera-Ramirez*, the defendant, suspected by Customs officers of carrying drugs internally, refused their request that he submit to an X-ray examination. The officers then took him to a hospital for the purpose of detaining him until he discharged the contents of his stomach. There, following a detention of approximately 12 hours, he excreted 95 condoms filled with cocaine. 729 F.2d at 1354-1355. In rejecting the defendant's argument that his detention was unreasonable under the Fourth Amendment, the court concluded (*id.* at 1356):

[10] Accord, *United States* v. *Castaneda-Castaneda*, 729 F.2d 1360, 1363 (11th Cir. 1984), petition for cert. pending, No. 84-5556; *United States* v. *Padilla*, 729 F.2d 1367, 1368 (11th Cir. 1984).

> The customs inspectors seized and detained [the defendant] on the basis of enough suspicion to justify a search of the contents of his stomach and intestinal tract. [The defendant] was then given the option of submitting to an x-ray, a relatively expeditious search method. He refused. The only way to restrict detention time at that point would have been to physically force an x-ray. The alternative, which the customs agents chose, was to hold the defendant until nature revealed what an x-ray would have shown. The defendant's refusal to agree to submit to an x-ray, which the agents could constitutionally perform, cannot convert the reasonable alternative search method of detention into a Fourth Amendment violation.

The decision of the Eleventh Circuit in *Mosquera-Ramirez* is thus squarely in conflict with the decision of the Ninth Circuit in this case.[11]

2. Moreover, the decision below is contrary to settled principles of Fourth Amendment law governing Customs searches and seizures at the border. As this Court explained in *United States* v. *Ramsey*, 431 U.S. 606, 619 (1977), "[b]order searches, * * * from before the adoption of the Fourth Amendment, have been considered to be 'reasonable' by the single fact that the person or item in question had entered into our country from outside. There has never been any additional requirement that the reasonableness of a border search depended upon probable cause." Congress has given Customs officers broad authority to search and detain persons entering the United States from a foreign country. 19 U.S.C. 1582.[12] Although this authority is lim-

[11] The government apprised the court of appeals of the conflict in its petition for rehearing en banc (at 9-10). The court nonetheless denied the petition (App., *infra*, 15a-16a).

[12] 19 U.S.C. 1582 provides:

> The Secretary of the Treasury may prescribe regulations for the search of persons and baggage and he is authorized

ited by the reasonableness requirement of the Fourth Amendment (see *United States* v. *Villamonte-Marquez*, No. 81-1350 (June 17, 1983), slip op. 6), this Court has never addressed the question of how the reasonableness standard should be applied to searches and seizures of persons at the border.[13]

This case involves the detention of a suspected smuggler at the border for what concededly was a lengthy period of time. The reasonableness of that detention, however, is not subject to the same standards as the detention of a suspect in a non-border setting. The Eleventh Circuit in *Mosquera-Ramirez*, 729 F.2d at 1356 (citations omitted), focused on the differences between detentions at the border and those away from the border:

> Border searches exist in an entirely different context than *Terry*-type stops. Of primary significance is that at the border, searches are not subject to the probable cause and warrant requirement of the Fourth Amendment. The governmental interest and the individual's expectation of privacy are also different than those involved in the normal domestic *Terry*-type stop. As this Court has stated: "[t]he national interests in self-protection and protection of tariff revenue authorize a requirement that persons crossing the border

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to employ female inspectors for the examination and search of persons of their own sex; and all persons coming into the United States from foreign countries shall be liable to detention and search by authorized officers or agents of the Government under such regulations.

See 19 C.F.R. 162.6. Customs officers stationed at ports of entry throughout the United States operate under mandatory guidelines issued by the Commissioner of Customs.

[13] See *United States* v. *Ramsey*, 431 U.S. at 618 n.13, where the Court left open the question "whether, and under what circumstances, a border search might be deemed 'unreasonable' because of the particularly offensive manner in which it is carried out."

> identify themselves and their belongings as entitled to enter and be subject to search." These different circumstances have produced a different result in the Fourth Amendment balancing process. At the border, a person may be detained long enough for the officials to determine they are entitled to enter the United States * * *. If the officials must determine that persons entitled to entry are not carrying contraband, they must be given time to make that determination using reasonable search methods.

Furthermore, as the court observed in *Mosquera-Ramirez*, 729 F.2d at 1356, "[c]onsideration of the reasonableness of the length of detention must focus on the purpose of detention in the first place. It would not seem unreasonable for government officials to detain a person for the period of time necessary to conduct a valid search." Cf. *United States* v. *Place*, No. 81-1617 (June 20, 1983), slip op. 10. Accordingly, we turn to examine the permissibility of the purpose for which respondent was detained—viz., to examine her bowel movements for evidence of contraband.

This Court has held that "'the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States* v. *Villamonte-Marquez*, slip op. 9 (quoting *Delaware* v. *Prouse*, 440 U.S. 648, 654 (1979)). See, *e.g.*, *United States* v. *Place*, slip op. 6-7; *United States* v. *Martinez-Fuerte*, 428 U.S. 543, 555 (1976); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878 (1975). The courts of appeals have applied such a general reasonableness analysis to border searches when the intrusiveness of the search procedure has extended beyond a routine inspection of the person and his effects. As the court explained in *Vega-Barvo*, 729 F.2d at 1344, in the context of border searches the reasonableness analysis consists of "a flexible test which

adjusts the strength of suspicion required for a particular search to the intrusiveness of that search. As intrusiveness increases, the amount of suspicion necessary to justify the search correspondingly increases. This approach attempts to balance the privacy interests of the international traveler and the Government's interest in controlling the flow of contraband." See, *e.g.*, *United States* v. *Grotke*, 702 F.2d 49, 51 (2d Cir. 1983); *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Sandler*, 644 F.2d 1163, 1167-1169 (5th Cir. 1981) (en banc); *United States* v. *Dorsey*, 641 F.2d 1213, 1216-1217 (7th Cir. 1981); *United States* v. *Asbury*, 586 F.2d 973, 975-976 (2d Cir. 1978); *United States* v. *Wardlaw*, 576 F.2d 932, 934-935 (1st Cir. 1978).

Because "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the state" *(Schmerber* v. *California*, 384 U.S. 757, 767 (1966)), one focal point of this analysis is upon the extent of the indignity suffered by the individual searched. More specifically, this aspect may properly be said to involve an assessment of three factors "which contribute to the personal indignity endured by the person searched: (1) physical contact between the searcher and the person searched; (2) exposure of intimate body parts; and (3) use of force." *Vega-Barvo*, 729 F.2d at 1345-1346. In applying these factors in a border search setting, the courts have concluded that, although a patdown search or an inspection requiring removal of an outer garment is permitted on the basis of nothing more than a Customs officer's subjective belief that such measures are necessary (see, *e.g.*, *United States* v. *Sandler*, 644 F.2d at 1169), a strip search may not be undertaken without a "reasonable" or "real" suspicion that the individual is carrying contraband. See, *e.g.*, *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Sandler*, 644 F.2d at 1169; *United States* v. *Dorsey*, 641 F.2d at 1217; *United States* v. *Asbury*, 586 F.2d at 975-976. And the Ninth Circuit has held that, in order to justify a search of body cavities, the Customs officers must have information supplying a "clear indication or plain suggestion" that the suspect is carrying contraband within his body. See *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Aman*, 624 F.2d at 912-913.

The court of appeals erred in holding that the "clear indication" standard applicable to body cavity searches (which we do not here contest) had to be met in order to justify respondent's detention for the purpose of permitting Customs officers to inspect her bowel movements.[14] As Judge Jameson explained in his dissent below (App., *infra*, 9a; footnote omitted), although performing a bowel movement while under the observation of a Customs official "imposes upon an individual's dignity, * * * such an imposition does not differ significantly from a strip search. In both cases, the 'search' consists of passive visual inspection of the body's surface and, in this case, of its waste products." See, *e.g.*, *United States* v. *Himmelwright*, 551 F.2d 991, 995-996 (5th Cir.), cert. denied, 434 U.S. 902 (1977); *United States* v. *Holtz*, 479 F.2d 89, 93 (9th Cir. 1973).[15] Moreover, such searches involve a substantially lesser degree of humiliation than a body cavity search, such as a digital probe of the anus or vagina. Unlike those intrusive procedures, the "search" technique at issue here

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[14] We address the quantum of suspicion necessary to permit detention for the purpose of conducting an X-ray search of a suspect's body cavity in our response to the petition for certiorari in *Vega-Barvo* v. *United States*, No. 84-5553, a copy of which will be furnished to counsel for respondent.

[15] As Judge Jameson pointed out (App., *infra*, 9a n.2), "a valid strip search may involve a visual inspection of the anal region." See, *e.g.*, *United States* v. *Holtz*, 479 F.2d at 93 (collecting cases); *United States* v. *Sosa*, 469 F.2d 271, 273 (9th Cir. 1972), cert. denied, 410 U.S. 945 (1973).

involves no physical contact with the suspect, no involuntary invasions beyond the body's surface into "the most intimate portions of the [suspect's] anatomy" (*United States* v. *Cameron*, 538 F.2d 254, 258 (9th Cir. 1976)), and none of the physical discomfort that may result from the exploration of body cavities. In view of these significant distinctions, it was entirely inappropriate for the court of appeals to require, as a predicate for the observation of respondent's bowel movements, the same quantum of suspicion that the court requires for a body cavity search.[16]

Turning to the detention in this case, we submit that, in view of the government's vital interests in interdicting drug trafficking, it was perfectly reasonable for the Customs officers to detain respondent for the period of time necessary either to confirm or dispel the reasonable suspicion that she was carrying drugs internally. Because respondent was given the option of submitting to an X-ray or moving her bowels under observation, the duration of her detention rested largely

[16] The "clear indication" threshold imposed by the court of appeals for detaining suspected alimentary canal smugglers for the purpose of inspecting their bowel movements is not only disproportionate in relation to the nature and scope of the intrusion involved, it is impractical. As Judge Jameson noted (App., *infra*, 10a), this standard may be met with relative ease in cases involving smuggling by insertion of drugs into body openings, due to the appearance of telltale indicia, such as lubricant stains on undergarments, a suspect's unnaturally stiff and erect gait, restricted body movements, and possession of condoms and lubricants. In contrast, alimentary canal smuggling does not ordinarily leave such readily observable external signs. See *United States* v. *Mendez-Jimenez*, 709 F.2d at 1303. Consequently, imposition of the higher "clear indication" standard would, as in this case, almost invariably require the release into this country of persons believed to be engaged in alimentary canal smuggling notwithstanding the presence of a reasonable suspicion on the part of experienced Customs officials that the persons are carrying contraband inside their bodies.

within her control. As Judge Jameson observed in his dissent below (App., *infra*, 9a), although respondent "may have suffered 'many hours of humiliating discomfort' she was herself solely responsible for a considerable part of it." On the other hand, the government has a compelling interest in being able to detain a person such as respondent, who is reasonably suspected of alimentary canal smuggling and who refuses to submit to an X-ray search, for the period of time necessary to confirm or dispel that suspicion. As noted in the dissent (*id.* at 10a), because such smuggling techniques do not commonly leave the telltale external signs that identify other types of body cavity smuggling (see note 16, *supra*), the least intrusive method for confirming or dispelling suspicions of alimentary canal smuggling—a method substantially less intrusive than subjecting the suspect to an internal examination—is to place the suspect under observation for an extended period of time.[17] Given the inherent difficulties of detecting alimentary canal smuggling without extended detention, and the absence of feasible alternatives, it is reasonable to detain at the border persons reasonably suspected of carrying narcotics internally for the period of time necessary to examine their bowel movements.[18]

[17] Because the purpose of Customs inspections is to prevent contraband from being smuggled across our borders, it makes little sense to suggest, as did the majority below (App., *infra*, 6a), that the Customs officers could have "let [respondent] into the country and [tried] to follow her." Although the officers did offer respondent the option of taking the first available return flight to her country of origin, that alternative is also unsatisfactory because it would afford a suspected smuggler like respondent the opportunity to escape apprehension and repeat her smuggling activities another day, and would generally encourage this smuggling technique by materially reducing the risk of apprehension and prosecution.

[18] Even if some more rigorous standard than reasonable suspicion is applicable to extended detentions of suspected smug-

3. Resolution of the conflict between the decision below and that of the Eleventh Circuit in *Mosquera-Ramirez* is necessary both to clarify an important question of Fourth Amendment law governing border searches and to afford guidance to federal law enforcement authorities responsible for interdicting drugs at the national borders or their functional equivalents. As these cases illustrate, narcotics smugglers have become increasingly adept at concealing contraband destined for distribution within the United States. In particular, alimentary canal smuggling has become a problem of substantial dimensions both because of its increasing frequency[19] and the difficulty inherent in its detection (see note 16, *supra*).

The decision below, severely restricting the use of a foolproof and relatively unintrusive investigative measure, has resulted in the application of different rules governing Customs procedures in the Eleventh and Ninth Circuits. Thus, the decision virtually invites alimentary canal smugglers to shift their operations to ports of entry within the Ninth Circuit, where, due to the prevailing rule limiting the permissible actions of Customs officers, their smuggling activities are more likely to pass undetected. It therefore is important that

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glers, we submit that any such standard was met here, where the officers had "a very substantial suspicion" that respondent—an alien with no right to enter the United States—was smuggling narcotics concealed inside her body (App., *infra*, 14a), and where the "detention" consisted merely of waiting with respondent in a room until arrangements could be made for her departure.

[19] To illustrate the magnitude of the problem, we note that in *United States* v. *Mendez-Jimenez*, 709 F.2d at 1301, the court observed that a Customs officer apprehended 25 body cavity smugglers on a single flight. Moreover, the increasing number of reported appellate decisions involving alimentary canal smugglers is also indicative of the dimensions of the threat posed by this smuggling method.

this Court resolve the conflict among the circuits to apprise Customs officials throughout the country of the proper standards governing detentions at the border of suspected alimentary canal smugglers. As Judge Jameson observed in dissent (App., *infra*, 12a), "[t]o deny the validity of [such reasonable detentions] would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1984

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5125

Argued and Submitted Dec. 8, 1983
Decided April 24, 1984

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ,
DEFENDANT-APPELLANT

Before GOODWIN and TANG, *Circuit Judges*, and JAMESON, *District Judge*.*

PER CURIAM.

Rosa Montoya de Hernandez appeals her convictions for possession of cocaine with intent to distribute in violation of 21 U.S.C. § 841(a)(1) and for importation of cocaine in violation of 21 U.S.C. §§ 952(a) and 960(a)(1). She argues that the district court erred in failing to suppress 88 bags of cocaine that passed through her alimentary canal after a lengthy airport detention following her arrival on a flight from Bogota, Colombia.

The question in this case is to locate that point on a continuum at which the level of well-founded suspicion on the part of the customs officers justifies the harsh choices which the officers may present to an incoming passenger. It is clear from the cases[1] that a fairly low

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*The Honorable William J. Jameson, Senior United States District Judge for the District of Montana, sitting by designation.

[1] A person entering the country is subject to routine searches without probable cause. *United States* v. *Ramsey*, 431 U.S. 606, 619, 97 S.Ct. 1972, 1980, 52 L.Ed.2d 617 (1977).

level of suspicion will permit a moderately intrusive search for contraband. It is equally clear from the cases[2] that the more intrusive and insulting the search, the greater must be the probability, based upon facts known before the search is made, that the search will indeed produce contraband. Bearing these general guidelines in mind, we examine the facts of this case.

Shortly after midnight on March 5, 1983, Ms. Montoya de Hernandez arrived in Los Angeles aboard a flight from Bogota, Colombia. She presented her passport and visa to immigration officials and proceeded to a customs line.

Customs officials reviewed her documents and directed her to a secondary area for a more thorough examination. There an Inspector Serrato reviewed de Hernandez's documents and questioned her regarding her trip to the United States. Serrato testified that he immediately suspected that de Hernandez was carrying drugs internally because she fit the common profile of an internal-body carrier.[3]

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[2] *Ramsey* notes that warrants are not required for border searches, but this circuit has indicated in dictum that while a warrant is not mandatory in body cavity searches, "the absence of a warrant is an important factor in assessing the reasonableness with which the authorities acted." *United States* v. *Cameron*, 538 F.2d 254, 259 (9th Cir.1976). Following *Cameron* we have had a number of published opinions and countless unpublished dispositions dealing with border searches made with and without warrants, and with or without some element of delay. *See, e.g., United States* v. *Couch*, 688 F.2d 599 (9th Cir.1982), and cases collected therein.

[3] De Hernandez had paid cash for her ticket, came from a source port of embarcation, carried $5,000 in U.S. currency, had made many trips of short duration into the United States, had no family or friends in the United States, had only one small piece of luggage, had no confirmed hotel reservations, did not speak English, and said she was planning to go shopping using taxis for transportation. Prior cases of body smugglers had taught the agents to regard these factors in various combinations as highly likely to identify a drug carrier. This particular suspect possessed almost all of the indicators.

Serrato had de Hernandez taken to another room for a pat down. That search failed to reveal evidence of contraband. The arriving passenger was then asked if she would consent to an x-ray search. She initially indicated that she would consent, but when she was told she would be taken to a hospital in handcuffs for the x-ray, she withdrew her consent. Officer Serrato's supervisors then contacted Special Agent Windes for the purpose of obtaining a court order for an x-ray search. *See United States* v. *Erwin*, 625 F.2d 838 (9th Cir. 1980).

Windes decided that the facts then known probably would not support a court ordered x-ray examination. At this time the arriving passenger had not yet been detained for an unusual period of time. Windes told Serrato and his supervisors to give the passenger three choices: She could either consent to an x-ray search, be held in custody until her bowels moved, or depart the United States on the next plane for Colombia. De Hernandez reluctantly consented to leave for Colombia, but the next flight could not be arranged for several more hours. She was therefore left with the "choice" of consenting to an x-ray or remaining in custody until her peristaltic functions produced a monitored bowel movement. She was taken to a room and held under the observation of Serrato and other inspectors for the remainder of the night and most of the next day, a total of some 16 hours.

A strip search after the 16-hour delay again failed to reveal contraband. Agent Windes decided to seek a court order for an x-ray and body cavity search. The application for the court order contained information gleaned during the 16-hour detention and observation of the passenger. This information include refusal of food and water and symptoms of discomfort suspected

to arise out of, or at least to be consistent with, heroic efforts to resist the usual calls of nature. At midnight the order was issued, nearly 24 hours after her plane had landed.

De Hernandez was taken to a hospital where a rectal examination revealed a balloon containing cocaine. She was given the *Miranda* warnings and taken to jail. During the next 4 days she passed 88 balloons containing cocaine.

"As a search becomes more intrusive, it must be justified by a correspondingly higher level of suspicion of wrongdoing." *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982) (citing *United States* v. *Aman*, 624 F.2d 911, 912-13 (9th Cir. 1980)). Therefore, a "real suspicion" that contraband is concealed on the body of the person to be searched is required for a strip search. *United States* v. *Guadalupe-Garza*, 421 F.2d 876, 879 (9th Cir. 1970). X-ray and body cavity searches are more intrusive than a strip search. Such searches require a "clear indication' or 'plain suggestion' that the person is carrying contraband within his body." *Ek*, 676 F.2d at 382 (citation omitted.) In this case, the officers had a strong suspicion that de Hernandez was carrying drugs in her body, but for more than 16 hours they did not apply for a court order. The officers decided, instead, to wait for nature to provide the stronger evidence that would support an order. This decision necessarily impacted both the comfort and the dignity of a human being.

The degree of suspicion necessary to justify a detention for the purpose of having a suspect produce a bowel movement has not been established. In *United States* v. *Couch*, 688 F.2d 599 (9th Cir. 1982), *cert. denied*, 459 U.S. 857, 103 S.Ct. 128, 74 L.Ed.2d 110 (1982), we affirmed the conviction. The customs officials in *Couch* had the usual indications of internal smuggling, plus an informant's tip. The suspect's detention

while a court order for an x-ray was sought was therefore reasonable. We did not then have to reach the issue whether the customs officials without a court order, could have detained the suspect on the same level of suspicion until his bodily processes had cleared his digestive tract of its contents. *Couch*, 688 F.2d at 603 n.5. In *Couch* we noted that such a detention could last two or three days. *Id.*

What circumstances justify the delay imposed in this case? These cases usually turn upon the sufficiency of the original evidence which establishes in the customs officer's mind the belief that the incoming passenger "fits the drug courier profile". If that evidence is strong, and where it is enhanced by a tip from a reliable informer, we have upheld lengthy delays and highly obtrusive searches. *See, e.g., Erwin, Couch, Ek,* and cases discussed therein. These cases suggest that when in doubt the customs officers should present their information to a magistrate and permit that judicial officer to exercise judicial discretion in striking the delicate balance between human rights and the practical necessities of border security.

In the case at bar, there was a justifiably high level of official skepticism about the woman's good faith as a tourist; but at the same time the officers knew that thousands of unusual looking persons cross international borders daily on all sorts of errands, many of which are wholly innocent. At the time the officers offered de Hernandez the alleged choice of taking the next plane back to Bogota (and remaining under observation during the wait), or submitting to a custodial x-ray examination, the officers knew that no plane would be leaving for Bogota for several more hours. The officers accordingly knew that the woman would suffer many hours of humiliating discomfort if she chose not to submit to the x-ray examination. Under the circumstances of this Hobson's choice, one can hardly

characterize as voluntary any decision on the part of de Hernandez to consent to wait under observation. Rather, the officers effectively decided that if she did not wish to submit to an x-ray examination, she could just wait until natural processes made that type of examination unnecessary, no matter how long that might be.

The officers themselves had limited options in the face of their strong belief that de Hernandez was a drug courier. They could let her into the country and try to follow her; they could seek a court order for an x-ray without undue delay; or they could detain her until nature took its course. They chose the latter. While there is some doubt about the humanity of the course the officers followed, it does have some support in the cases. *See, e.g., Erwin, supra.* However, following *Ek, supra,* this court decided *United States* v. *Quintero-Castro,* 705 F.2d 1099 (9th Cir. 1983). It is difficult to distinguish the facts known to the customs officers when they decided to detain de Hernandez from the facts known to the officers and transmitted to the magistrate in *Quintero-Castro.* In *Quintero-Castro* we held those facts to be insufficient to authorize the warrant for an x-ray search. Here, if the facts apparent upon arrival would not authorize the issuance of a warrant, it is difficult to hold that the same facts would authorize the long period of detention which eventually did produce some additional evidence in support of a warrant. Under the teaching of *Quintero-Castro,* if not compelled by the holding, the trial court should have suppressed the evidence in this case.

Contrary to the government's assertions, we find the result in *United States* v. *Mendez-Jimenez,* 709 F.2d 1300 (9th Cir. 1983), distinguishable from the present fact pattern. In *Mendez-Jimenez,* the court found that an x-ray search which revealed foreign objects in defendant's body was not conducted in violation of the

Fourth Amendment. *Id.* at 1304. We first noted that unlike the present case, the customs officers in *Mendez-Jimenez* petitioned the magistrate for a court order authorizing an x-ray examination as soon as their preliminary investigation was completed. Additionally, the evidence submitted to the magistrate in *Mendez-Jimenez* contained several factors supporting a finding of clear indication that did not exist in the present case: (1) defendant's possession of an anti-diarrhea medication, (2) evidence of nonconsumption of food or beverages before defendant was detained and during the preliminary investigation, and (3) evidence of passport tampering. Moreover, the decision by the customs officers in the present case not to seek a court order for an x-ray search was based in part on their belief that they did not have sufficient facts to support the issuance of the order. We find that, in the instant case, the evidence available to the customs officers when they decided to hold de Hernandez for continued observation was insufficient to support the 16-hour detention.

Reversed.

JAMESON, *District Judge*, dissenting:

I respectfully dissent.

The Fourth Amendment functions "to protect personal privacy and dignity against unwarranted intrusion by the State." *Schmerber* v. *California*, 384 U.S. 757, 767, 86 S.Ct. 1826, 1834, 16 L.Ed.2d 908 (1966). It is undisputed here that the initial strip search was not an unwarranted intrusion on de Hernandez's privacy and dignity. The sole question is whether the subsequent detention, with the possibility that she would produce a monitored bowel movement, thereafter became an unwarranted or unreasonable intrusion on her privacy and dignity. This question requires us to strike a delicate balance. I would strike the balance in favor of the Government.

I recognize that a close question is presented, particularly under *United States* v. *Quintero-Castro*, 705 F.2d 1099 (9th Cir. 1983). In my opinion, however, *Quintero-Castro* and the other cases cited in the majority opinion may be distinguished.[1] The opinion contains a fair summary of the facts. In addition, however, the following may be considered:

First, while the initial purpose of the detention was to "[have] a suspect produce a bowel movement," in fact no such bodily function occurred. Instead, the customs agents merely observed and occasionally questioned Ms. de Hernadez for a period of 16 hours. From their observations, they gained further evidence that, in the magistrate's view, gave a "clear indication" of alimentary canal smuggling. Consequently, the detention

[1] *Quintero-Castro* involved an X-ray rather than detention, and we expressly recognized that "X-ray and body cavity searches are the most intrusive," requiring a "'clear indication' or 'plain suggestion' that the person is carrying contraband within his body." A "real suspicion" is sufficient for a strip search. 705 F.2d at 1100.

was minimally intrusive, and though de Hernandez may have suffered "many hours of humiliating discomfort," she was herself solely resonsible for a considerable part of it.

Even if de Hernandez had performed her peristaltic functions under the observation of a customs official, I would hold that the detention did not thereby become significantly more intrusive than a strip search. Certainly, performing such bodily functions while under observation imposes on an individual's dignity, but such an imposition does not differ dramatically from a strip search.[2] In both cases the "search" consists of passive visual inspection of the body's surface and, in this case, of its waste products. On the other hand, we distinguish body cavity and X-ray searches precisely because they intrude "beyond the body's surface." *United States* v. *Aman*, 624 F.2d 911, 912 (9th Cir. 1980). We have noted that body cavity searches are sometimes painful and always invade "the most intimate portions of [the suspect's] anatomy," *United States* v. *Cameron*, 538 F.2d 254, 258 (9th Cir. 1976). Additionally, X-rays pose the potential for physical harm to the suspect. See *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982). The detention in this case did not contemplate an invasion beyond the body's surface nor did it require the same degree of humiliation attendant on such an invasion.

[2] A valid strip search may involve "a visual search of the anal region." *United States* v. *Sosa*, 469 F.2d 271, 273 (9th Cir. 1972), *cert. denied*, 410 U.S. 945, 93 S.Ct. 1399, 35 L.Ed.2d 612. We have also upheld a strip search in which the female suspect was asked "to turn around and bend over." *United States* v. *Shields*, 453 F.2d 1235, 1236-37 (9th Cir. 1972), *cert. denied*, 406 U.S. 910, 92 S.Ct. 1615, 31 L.Ed.2d 821, cf. *Henderson* v. *United States*, 390 F.2d 805 (9th Cir. 1967) (suspect made to "manually open her vagina for visual inspection" constituted body cavity search).

Second, this court recently recognized "that smuggling by ingestion into the alimentary canal does not leave the external signs that body cavity (e.g., rectum or vagina) smuggling does." *United States* v. *Mendez-Jimenez*, 709 F.2d 1300, 1303 (9th Cir. 1983) (Citation omitted). As a result, many of our prior decisions are simply not analogous to the present facts, particularly cases where we relied on the suspect's unnaturally stiff and erect gait, restricted body movements and possession of lubricants to demonstrate a clear indication of body cavity smuggling. See, *e.g.*, *United States* v. *Shreve*, 697 F.2d 873 (9th Cir. 1983); *United States* v. *Aman*, 624 F.2d 911.

It is clear tht narcotics smugglers have become increasingly adept at concealing contraband. Consequently, the indicia used by customs officials to identify smugglers have in some cases become more general and circumstantial. Alimentary canal smugglers, for example, prepare their bodies by first taking laxatives to clear their digestive tracts; they then swallow their valuable cargo of narcotics often in capsules or "balloons"; finally they take certain drugs to inhibit digestion and prevent diarrhea during their *usually brief* flight to the United States. Once they reach their destination, they take another laxative to retrieve the narcotics. See *United States* v. *Couch*, 688 F.2d 599, 600 (9th Cir. 1982). Beyond the usual "profile" of the narcotics smuggler, therefore, there are only a few consistently apparent and reliable indications that a person is smuggling narcotics in his alimentary canal. The two most common indications are the consistent refusal to eat or drink and the suspect's often Herculean efforts to stifle his natural peristaltic functions.

It must be stressed that the foregoing indications of alimentary canal smuggling can only be observed *over a period of time*. Allowing a reasonable period of detention, based on a real suspicion, is the least intrusive and

most reliable means of identifying alimentary canal smugglers.[3]

Third, it is well settled that we do not review evidence supporting a "real suspicion" or a "clear indication" of smuggling in light of our own experiences or those of a reasonable man:

> On the contrary, the question is whether an experienced customs officer ... after assessing the totality of the evidentiary factors and circumstances in the light of his own training and experience, would conclude that there was a clear indication that the defendant was engaged in internal body smuggling.

United States v. *Mendez-Jimenez*, 709 F.2d at 1302-03 (Citation omitted). It is undisputed in this case that the facts initially known by the customs officials justified a "real suspicion" that de Hernandez was carrying narcotics. The first strip search was valid in light of their real suspicion. Similarly, in determining whether the subsequent detention was valid, we must give due weight to the good faith, experienced assessment of the customs officials.

I would permit reasonable detentions at the border for the purpose of observing persons suspected of alimentary canal smuggling so long as the detention is based on a real suspicion sufficient to justify a strip search. In *United States* v. *Couch*, 688 F.2d 599, 603-04 (9th Cir. 1982), we held that an extended detention is valid if it is reasonably related to a valid search. We also pointed to the well established rule that '[g]ov-

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[3] As a practical matter, of course, a detention would not be necessary if customs officials could seek a court order for an X-ray on the basis of a "real suspicion." In *United States* v. *Ek*, 676 F.2d 379, 382 (9th Cir. 1982), however, we adopted the higher "clear indication" standard for X-ray searches. As the court recently observed, the wisdom of this decision may be questioned, but it is the law of the circuit. *United States* v. *Shreve*, 697 F.2d 873, 874 (9th Cir. 1983).

ernment agents are given considerably more leeway at the border." *Id.* at 602. Since the strip search was valid in this case and given the elusive nature of the smuggling suspected here, I think the detention was reasonably related to the initial search. See also *United States* v. *Ek*, 676 F.2d at 382; *United States* v. *Erwin*, 625 F.2d 838, 841 (9th Cir. 1980). Although the detention was perhaps longer than absolutely necessary, I do not think it was unreasonable. The additional evidence obtained during the observation period demonstrated a clear indication of alimentary canal smuggling.

To deny the validity of reasonable detentions would reward the increasing ingenuity of narcotics smugglers and seriously hamstring the good faith efforts of customs officials to stem the flow of illegal narcotics across our borders. Eighteen years ago, this court declared that its review of border searches must "be governed by the practical knowledge of the extent to which smugglers are willing to degrade their bodies in order to obtain the drugs they crave or the money they desire." *Rivas* v. *United States*, 368 F.2d 703, 710 (9th Cir. 1966). Nor can we ignore the generally improved treatment of smuggling suspects at the border,[4] the regularity with which customs officials now seek court orders and warrants, and the ready availability of relatively unintrusive X-ray procedures as an alternative to body cavity searches. These are all factors which must be considered "in striking the delicate balance between human rights and the practical necessities of border security." I would strike the balance here in favor of the Government.

I would affirm.

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[4] *Cf. United States* v. *Cameron*, 538 F.2d 254, 256-57 (9th Cir. 1976); *Blefare* v. *United States*, 362 F.2d 870 (9th Cir. 1966); *Blackford* v. *United States*, 247 F.2d 745 (9th Cir. 1957), *cert. denied*, 356 U.S. 914, 78 S.Ct. 672, 2 L.Ed.2d 586.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

HONORABLE WILLIAM P. GRAY, JUDGE PRESIDING

No. CR 83-218-WPG

UNITED STATES OF AMERICA, PLAINTIFF

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ, DEFENDANT

REPORTER'S TRANSCRIPT OF PROCEEDINGS

Place: Los Angeles, California

Dates: Monday, April 25, 1983
Tuesday, April 26, 1983

[52] THE COURT: I'm going to deny the motion to suppress the cocaine that she excreted. It seems to me that, under all the circumstances, the officers were justified in having a very substantial suspicion that this lady may very well be bringing in cocaine, to the point where they were justified in seeking and proposing an x-ray.

Having refused the x-ray, I am of the view—[53] it is my understanding that, under all those circumstances, they were justified in saying, "If you do not agree to an X-ray, we are not obliged to let you go. We will just keep you for a while until, A, we can send you back home; or, B, you have a regular bodily function that might indicate that you are carrying something."

I am putting aside the fact that they did ultimately get a warrant, because several things happened before they even applied for it. If they had no right to detain her as long as they did before that occurred, then they had no right to use the evidence that occurred while they were detaining her.

Under those circumstances, the motion to suppress will be denied.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 83-5125
DC. No. CR 83-215-WPG

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE,

v.

ROSA ELVIRA MONTOYA DE HERNANDEZ,
DEFENDANT-APPELLANT.

[FILED AUG. 10, 1984]

ORDER

BEFORE: GOODWIN and TANG, *Circuit Judges*, and JAMESON, *District Judge*

A majority of the panel voted to deny the petition for rehearing and reject the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc and an active judge called for a vote on whether to reconsider the matter en banc. A majority of the active judges voted against rehearing en banc. (Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for reharing en banc is rejected.